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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Docket No. 73-625

FRANK STARR

Petitioner,

vs.

STATE OF NEW JERSEY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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No. 73-625

FRANK STARR

Petitioner,

vs.

STATE OF NEW JERSEY

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

STATE'S BRIEF IN OPPOSITION

Petitioner, Frank Starr, seeks a Writ of Certiorari to review the judgement of the Supreme Court of New Jersey entered on September 19, 1973, which denied a Petition for Certification to the Appellate Division, Superior Court of New Jersey. Your respondent respectfully urges denial of the writ of certiorari.

OPINION BELOW

The order of the Supreme Court of New Jersey was entered on September 19, 1973, and appears in petitioner's Appendix B.

The opinion of the Appellate Division, Superior Court of New Jersey was decided on May 31, 1973 and appears in petitioner's Appendix A (pages 1a through 3a).

JURISDICTION

Jurisdiction is invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the breaking of the door to petitioner's home and the failure of the police to announce themselves violated the Fourth Amendment of the United States Constitution and rendered the subsequent search illegal?

2. Whether the Fourteenth Amendment to the United States Constitution was violated by the Court's failure to set forth any reasons for the sentence imposed upon the petitioner and by the fact that prior to the imposition of sentence the Attorney General sent an *ex parte* letter to the Court?

COUNTER-STATEMENT OF THE CASE

On December 18, 1970, a State Police raiding party executed a search warrant on 16 Romaine Avenue, Jersey City, New Jersey. (T2215 to 13). The second floor apartment was the object of the search. The front door of the apartment was closed and locked. Without ringing the bell, the officers broke down the door and entered. (T22-9 to 24). This occurred at approximately 1:00 P.M. (T23-1 to 3). Upon entering, Trooper Davis observed petitioner's wife and another woman sitting on a couch opposite the door. (T23-6 to 10). In addition he saw a desk on the right side of the room with gambling paraphernalia on top. (T23-10 to 13). Petitioner's wife identified herself and was placed under arrest. (T23-19 to 21). The other woman was identified as Frances Gulka, petitioner's daughter. (T23-22 to T24-1).

A telephone was next to the desk and the Trooper verified its number as that listed. (T25-5 to 9). On and around the desk were an adding machine, six small pads, various writing utensils, and various slips of paper with numbers and figures written thereon. (T26-5 to T28-21).

Approximately 20 minutes after the police had entered, petitioner arrived. He identified himself and stated that he lived in the apartment. He was then arrested. (T25-13 to T26-2).

Petitioner and others were charged under three State Grand Jury indictments with violations of the gambling laws. Indictment 14-B, in separate counts, charged petitioner with working for an unlawful lottery operation, *contra N.J.S.A.* 2A:121-3 (a), possession of lottery paraphernalia in violation of *N.J.S. A.* 2A:121-3 (b), and maintaining a place used for a lottery operation. Indictment 14-C charged the petitioner and others with conspiracy to engage in bookmaking on horses and to maintain premises for the purposes of gambling on horses, and charged petitioner with engaging in bookmaking on horses and maintaining premises for gambling on horses; all in violation of

N.J.S.A. 2A:112-3. Indictment 14-D charged the petitioner and others with conspiracy to engage in bookmaking on sporting contests and maintaining premises for that purpose, all *contra* *N.J.S.A.* 2A:112-3.

A Motion to Suppress evidence was heard on stipulated facts and was denied on May 28, 1971, by the Honorable M. Raymond McGowan, J.S.C., and an Order to that effect was filed on October 7, 1971.

The State moved these indictments for trial on May 8, 1972 before the Honorable Louis R. Aikens, J.C.C., and a jury. Prior to trial, the State asserted that it would not move the conspiracy counts and that a motion to dismiss those counts would be made at the conclusion of the trial. (T5-9 to 13). It was also agreed by counsel and the court that although there were three separate counts for maintaining premises for a variety of types of gambling, conviction could only be had on one of those counts. (T7-25 to T9-16).

At the conclusion of the State's case petitioner's Motion for Judgment of Acquittal was granted as to those counts which charged working for a lottery, bookmaking on horse racing, and bookmaking on sporting contests. (T54-3 to 4; T64-1 to 3). The Court denied petitioner's Motion for Acquittal on the charges of possession of lottery paraphernalia and maintaining premises for gambling. (T63-20 to T64-3). The jury returned verdicts of guilty on those two charges. (T134-12 to 17).

After trial, but prior to sentencing, the Deputy Attorney General who prosecuted this case sent a letter to the sentencing judge informing him of the nature of the counts on which petitioner was convicted and apprising the judge of his intention to move to dismiss the remaining counts of the indictments. In that letter he recommended that petitioner be given a custodial sentence. The letter contained no new factual allegations nor did it offer any new information not a matter of record. A copy of this letter was not forwarded to defense counsel. At sentencing defense counsel stated that he had no copy of the letter, but he did not demand a copy at that point, nor did he ask to be shown the contents of the letter. (T82-10 to 13).

In petitioner's brief in the Superior Court of New Jersey, Appellate Division, he questioned the propriety of the aforementioned letter which was sent to the sentencing judge. The State, in an effort to clarify the issues for the Appellate

Division, made a Motion to Enlarge the Appellate Record, the subject of which was this letter and an affidavit of the sentencing judge as to any reliance he placed on the letter in imposing sentence.

REASONS FOR DENYING THE WRIT
POINT I

THAT POLICE, ARMED WITH A SEARCH WARRANT, FORCED THEIR WAY INTO DEFENDANT'S APARTMENT WITHOUT ANNOUNCING THEIR IDENTITY AND PURPOSE DID NOT RENDER THIS SEARCH ILLEGAL.

It was stipulated at the pre-trial hearing on the Motion to Suppress that the members of the search party did not knock or announce their presence prior to breaking down the door to defendant's apartment.

The police had obtained a valid search warrant prior to the raid. Defendant does not challenge the validity of the warrant but, rather, maintains that the search and seizure was rendered illegal by the manner in which the officers effected their entry.

The New Jersey Supreme Court has assumed that *Mapp v. Ohio*, 367 *U.S.* 343 (1961), makes the holding of *Miller v. United States*, 357 *U.S.* 301 (1958), applicable to the States. *State v. Smith*, 37 *N.J.* 481 (1962). In *Miller*, *supra*, this Court held that even where the authority to arrest or to search is clear, law officers may not break into a dwelling house without first stating their authority and their purpose for demanding admission. However, the court expressly reserved judgment as to whether there may be noncompliance with the rule when exigent circumstances exist. The court stated:

> ". . . There are some state decisions holding that justification for noncompliance exists in exigent circumstances, as, for example, when the officers may in good faith believe that they or someone within are in peril of bodily harm, *Read v. Case*, 4 *Conn.* 166, or that the person to be arrested is fleeing *or attempting to destroy evidence*. *People v. Maddox*, 46 *Cal. 2d* 301, 294 P. 2*D* 6." *Miller v. United States*, *supra* at 309. (Emphasis added).

The New Jersey Supreme Court held in *State v. Smith*, *supra*, that where peace officers armed with a search warrant or "probable cause" are confronted with a closed apartment door,

they may break it open without prior announcement when the nature of the contraband sought makes it reasonable to believe that announcement of their presence would result in the destruction of that contraband. The court stated:

> **"The question then is whether the Fourt Amendment intended to nullify the State's clear right to search by imposing a condition which would defeat it. If the State's right to the contraband is to be denied, it must be because of the evident danger and rudeness of a sudden entry. But the danger and the rudeness are not the gratuitous product of official insolence or indifference, they are the consequences of the criminal enterprise, made inescapable by its nature. Moreover in striking a balance between the right of the State and the rights of the individual, the need to protect the innocent is not a conspicuous factor: for as we have said, the hypothesis includes the existence of probable cause and indeed a reasonable basis to believe a criminal event is in progress. Hence, to require that admittance be demanded and the mission revealed before entry into the premises would, overall, benefit the guilty alone". *State v. Smith, supra* at 199-500.**

In *Smith* the police sighted the defendant through the keyhole as he held a hypodermic needle to his arm preparatory to injecting himself with its contents. What the officer saw through the keyhold was not the *exigent circumstance* that justified forceful entry, but rather the *"probable cause"* which justified the warrantless search. Armed with the "probable cause" to believe that narcotics were held inside the apartment, the officers were justified in effecting a lawful search by an unannounced, forced entry because the contraband was readily destructible. As the court stated:

> **"The nature of the contraband was such that if the officers' mission had first been announced, the articles likely, would have literally gone down the drain". *State v. Smith, supra* at 199.**

In *State v. Fair*, 45 *N.J.* 77 (1965), where police, without a warrant, broke into an apartment to arrest a person suspected of a knife killing, the court reiterated the common law rule requiring the antecedent conduct of demanding admission and stating the purpose for the entry. It said, however, that such conduct is not required where: (1) immediate action is required to preserve evidence; (2) the officer's peril would be increased; or, (3) the arrest would be frustrated. See also, *State v. Doyle*, 42 *N.J.* 334 (1964). It should also be noted that the New Jersey Supreme Court has favorably cited *United States v. Lockclear*, 237 *F.Supp.* 895 (N.D. Calif. 1965) for the proposition that the fact that officers enter by force or ruse has no bearing on the legality of the subsequent search and seizure or arrest where the officers have a valid warrant or have probable cause to believe that a crime has been or is being committed within the invaded room. *State v. Miller*, 47 *N.J.* 273 (1966).

The State submits that whether or not police, who are effecting a search of a residence suspected of housing a bookmaking enterprise, have reason to believe that prior detection of their presence by the occupants will result in the destruction of evidence, has been answered affirmatively in *State v. Juliano*, 97 *N.J.Super.* 28 (App.Div. 1967) modified on other grounds 52 *N.J.* 232 (1968). There, police officers possessing a search warrant induced the wife of the apartment house superintendent to ring the bell of the suspect apartment and announce that a package had been delivered for the occupant. The defendant unlatched the door and cracked it open, whereupon the police forced their way in without first announcing their presence or purpose. The court upheld the legality of the forced entry without prior announcement because of the nature of the offense being investigated and the attendant potentialities for the destruction of the incriminating evidence. *State v. Juliano, supra* at 32.

It is a matter of common police experience that bookmaking operations use rice paper and water soluble paper designed for ready disposal. *State v. Kuznitz*, 105 *N.J. Super.* 33 (Cty.Ct. 1969). A slight delay between the time the occupants gain knowledge of the police presence and the time of entry by the police invariably results in the incriminating papers being burned, flushed away, secreted, or thrown out a window. To require that officers announce their presence and identity and state their purpose as a

condition to their effecting a lawful search in such cases will indeed confer a great advantage to the guilty violators of this State's gambling laws. As was stated in *State v. Smith, supra* at 500:

> "It seems to us that the Fourth Amendment does not transmute a 'reasonable' search into an 'unreasonable' one merely because the officer discharged his duty to arrest and search in a manner which fairly appeared necessary for the successful enforcement of the State's right. At any rate, in these circumstances the exclusion of the evidence would not be an appropriate sanction in the light of the probable rationale of the exclusionary rule".

Defendant's assertions as to New Jersey Supreme Court decisions relating to the Fourth Amendment are totally without merit. One need only look at the New Jersey cases cited here to see that these decisions comport with the controlling decisions of the United States Supreme Court.

POINT II

THE SENTENCING OF PETITIONER COMPORTED WITH THE REQUIREMENTS OF DUE PROCESS.

Petitioner contends that the sentencing procedure was improper in that the judge failed to set forth his reasons for the sentence imposed. However, *R.*3:21-2, *New Jersey Rules of Court,* makes such a statement discretionary rather than mandatory. The case of *Kent v. United States,* 383 *U.S.* 541, 562 (1966), cited by petitioner is inapplicable as it dealt not with sentencing but with the waiver of jurisdiction by a juvenile court. There is no authority nor compelling reason which requires a sentencing judge to give his reasons for the imposition of a particular sentence. Absent a particular claim of impropriety in the sentence imposed, the sentencing judge's reason for the quantum of sentence imposed is not required nor necessary.

Furthermore, the present sentencing practice must be viewed in the context of the current New Jersey procedure. Every defendant is entitled to one appeal as of right. *R*2:2-3, *New Jersey Rules of Court.* In New Jersey, a defendant may always raise the error of excessiveness of sentence, even when that sentence is within statutory limits. *State v. Bess,* 53 *N.J.* 10 (1968); *State v. Laws,* 51 *N.J.* 494 (1968). Thus, the fact that the sentencing judge may not state the rationale for his sentence on the record becomes of little significance, since the reviewing court will consider the issue of whether the sentence was a proper exercise of discretion based upon all the information properly considered.

Petitioner additionally claims that the sending of a letter to the sentencing judge prior to sentencing violated due process. After trial, but prior to sentencing, the Deputy Attorney General who prosecuted this case sent a letter to the sentencing judge informing him of the nature of the counts on which defendant was convicted and apprising the judge of his intention to move to dismiss the remaining counts of the indictments. In that letter he recommended that petitioner be given a custodial sentence. The letter contained no new factual allegations nor did it offer any new information not a matter of record. A copy of this letter was not forwarded to defense counsel. At sentencing defense counsel stated that he had no copy of the letter but he did not demand a

copy at that point, nor did he ask to be shown the contents of the letter. (TS2-10 to 13).

Prosecutors properly make recommendations as to sentence at sentencing hearings as a matter of course. Indeed, this function is encompassed by their prosecutorial duties and cannot be said to be prejudicial to the convicted defendant since the prosecutor remains in his adversarial role through sentencing. Prejudicial error may be injected into a sentencing hearing if the prosecutor introduces matters detrimental to the defendant which were not adduced at trial and not recorded in the pre-sentence report, and the sentencing judge allows such matters to influence his decision as to the sentence. *State v. Leckis*, 79 *N.J.Super.* 479, 487 (App. Div. 1963). However, that is not the case here. The letter to the court contained no new allegations, nor did it call the court's attention to any matters outside the record that could affect petitioner's sentence. The State submits that the recommendation that petitioner be incarcerated, though communicated to the court by letter, had the same effect as if the prosecutor had made his recommendation at the sentencing hearing. Petitioner's sentence was in no way unfairly influenced thereby.

It has been conceded that it is better practice for an adversary to forward to his opponent a copy of all written communications to the court. *Code of Professional Responsibility D.R. 7-110.* The obvious danger that can arise when this is not done is that one party can put matters before the court which his adversary has no opportunity to refute. When adverse matters relevant to a defendant's sentencing are submitted to the sentencing judge and the defendant is denied a fair opportunity to be heard as to their accuracy it offends rudimentary fairness. *State v. Kunz*, 55 *N.J.* 128 (1969). However, this is not the situation in the case at bar. Here, the sentencing judge's decision was based on the nature of the crime and the pre-sentence report. As pointed out above the prosecutor's letter presented no collateral information relevant to sentencing upon which the sentence rendered could have been based. It was merely a bare recommendation that petitioner be incarcerated. Defense counsel was apprised of all information before the sentencing judge when he made his oral argument for leniency. It is clear from the remarks made by defense counsel at sentencing that he was aware of the possibility of petitioner being given a custodial sentence and argued accordingly. (TS2-10 to 25). Defense counsel could have done no more had he been ap-

prised of the contents of the letter. Therefore, the State submits that there was full disclosure to the defendant of all information which could have affected the court's sentence, and petitioner was given full opportunity to exercise his right to be heard on that information.

Petitioner additionally contends that the State again violated petitioner's right to due process when it made a Motion to Enlarge the Appellate Record while this matter was pending in the New Jersey Superior Court, Appellate Division. In the brief filed by petitioner in the Appellate Division, it was alleged, as here, that the sentencing of Frank Starr did not comport with due process in that the Deputy Attorney General who had been assigned to the matter had sent a letter to the sentencing judge prior to the imposition of sentence. A copy of that letter was not submitted to defense counsel. In the State's responding brief on appeal, it was submitted that a discussion of whether the sentencing process was impaired by the submission of the aforementioned letter required that the letter be seen by the appellate court. It was also submitted that if the court found some defect in the sentencing procedure the necessity for a remand could be avoided by considering an affidavit of the sentencing judge. Accordingly the State submitted a Motion to Enlarge the Appellate Record, the subject of which was the letter originally sent to the sentencing judge and an affidavit of the sentencing judge regarding the sentencing process.

It should initially be noted that defense counsel took no exception to the submission of the letter for review to the Appellate Division. He did however object to the submission of the affidavit by the sentencing judge and further claimed that this was another example of *ex parte* action by the Attorney General's office and the sentencing judge. It is respectfully submitted that the submission of the sentencing judge's affidavit to the Appellate Division was nothing more than a good faith effort on the part of the State to see that the Appellate Division was furnished with all materials necessary for the disposition of the appeal in an efficient and orderly manner. The affidavit was not appended to the brief but rather was properly made the subject of a Motion to Enlarge the Appellate Record, thereby giving the Appellate Division the opportunity to decide whether it would consider the submitted material.

As was pointed out in *Ridge v. Manker*, 132 *Fed.* 599, 601 (8 Cir. 1904):

> **"An appellate court may avail itself of authentic evidence outside of the record before it of matters occurring since the decree of the trial court when such course is necessary to prevent a miscarriage of justice, *to avoid a useless circuity of proceedings*, to preserve a jurisdiction lawfully acquired, or to protect itself from imposition or further prosecution of litigation when the controversy between the parties has been settled, or other reasons has ceased to exist." (Emphasis added).**

In *Ballurio v. Castellini*, 28 *N.J. Super.* 368 (App. Div. 1953), the court cited the above quoted language from *Ridge, supra*, and noted that the court in *Ridge* had neither constitutional article nor rule of court to guide or control such a result. However, in New Jersey such authority is conferred upon the Supreme Court and the Appellate Division of the Superior Court by the 1947 Constitution, Art. VI, Sec. V, par. 3. The exercise of original jurisdiction has also been made the subject of a specific rule by the Supreme Court, *R.*2:10-5 (formerly *R.R.* 1:5-4(a)). Thus it is clear from the decisions of our New Jersey Constitution, and rules of our Supreme Court, that the Appellate Division clearly had the right to exercise original jurisdiction and accept such an affidavit for the disposition of an appeal which was pending. The question becomes whether the affidavit submitted in the above-captioned matter was such that the appellate court could consider it in rendering a decision on the merits of this case.

In *Putt v. United States*, 363 *F. 2d* 369 (5 Cir. 1966), a sentence was attacked on the ground that the pre-sentence report contained false charges. The trial judge certified that the allegedly false charged played no part in the sentencing and accordingly the sentence was upheld. The New Jersey Supreme Court in *State v. Kunz*, 55 *N.J.* 128 (1969), considering a similar problem noted:

> **"The ability of trained judges to exclude from their consideration irrelevant or improper evidence and materials which have come to their attention and to so certify for appellate purposes, has been recognized throughout our law. We have no reason to doubt that it may properly be applied in the field of sentencing." *Id.* at 145.**

In the dissenting opinions filed by Justices Haneman and Francis, both suggested that the sentencing judge certify as to what part the several portions of the presentence report played in his sentencing and upon the return of such certification the disposition of the appeal could be rendered. As Justice Francis pointed out, if the improper material was not a factor in the sentence, the judgment should be affirmed. If it was a factor, then the record should be remanded to the trial court for reconsideration of the sentence. In *State v. Marvel*, 55 *N.J.* 83 (1969), the court also considering the validity of a sentence where there had not been disclosure of a presentence report, considered letters written by the trial court subsequent to the imposition of sentence in determining whether the sentence imposed would have been different had the trial judge been aware of statements now alleged by the defendant.

Thus there was ample precedent for the Appellate Division to affirm the sentence imposed below by examining a statement of the sentencing judge as to his considerations at the time of sentence. Such action by the Appellate Division afforded the defendant every protection due him, yet avoided a useless circuity of proceedings.

Thus, petitioner was afforded all guarantees of due process throughout these proceedings, from the imposition of sentence through the appellate process.

CONCLUSION

For all the foregoing reasons, respondent, State of New Jersey, respectfully urges that the Petition for Certiorari to the New Jersey Superior Court, Appellate Division, not issue.

Respectfully submitted,

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